IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW SCOTT PEñA, Appellant.	No. 37704-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Following his guilty plea to second degree identity theft, the trial court sentenced Matthew S. Peña to 22 months confinement and failed to impose the statutorily required community custody. RCW 9.94A.411(2); former RCW 9.94A.715(1) (2006). Shortly thereafter, the Department of Corrections (DOC) notified the trial court of the error and, after a resentencing hearing, the trial court modified Peña's sentence to include 9 to 18 months community custody. Peña appeals the trial court's (1) modification of his judgment and sentence to include statutorily mandated community custody and (2) imposition of a community custody provision requiring that he participate in anger management treatment. Specifically, Peña contends that the trial court's failure to impose the statutorily mandated community custody was an intentional decision resulting in an imposition of an exceptional sentence downward. Peña also argues that because there is no evidence that anger management treatment is "reasonably related"

to his crime, the trial court erred when it imposed such a condition.

Because community custody is required when an individual is sentenced to a term with DOC for a crime against persons, including second degree identity theft, and there is no evidence in the record that the trial court intended to impose an exceptional sentence downward, we affirm the trial court's decision to modify Peña's sentence to include community custody. Because the State concedes that the community custody provision requiring Peña to undergo anger management treatment is in error and there is no evidence in the record that anger management issues are reasonably related to Peña's crime, we accept the State's concession and vacate Pena's anger management treatment condition.

FACTS

On April 4, 2007, the State charged Peña with three counts of second degree identity theft. On May 9, 2007, Peña pleaded guilty to one count of second degree identity theft. In his statement on plea of guilty to a non-sex offense, Peña stated that he understood all of the consequences of his guilty plea; specifically, Peña acknowledged that because he had an offender score of seven, the standard sentencing range for one count of second degree identity theft was 22 to 29 months, plus 9 to 18 months of community custody. In exchange for Peña pleading guilty to one charge of second degree identity theft, the State agreed to move to dismiss counts 2 and 3, recommend 22 months of confinement along with 9 to 18 months of community custody, credit Peña with 37 days for time served, and impose various other provisions regarding costs and other prohibitions. Peña's statement on plea of guilty also indicates that the judge is not required to follow the State's recommendation. Moreover, Peña's statement on plea of guilty indicated that both he and his attorney had read the entire statement and that he understood it in full.

Furthermore, when asked, Peña verbally informed the trial court that he read the plea form with his attorney and that he understood the State's recommendation as it was laid out in his statement on plea of guilty. The trial court accepted Peña's plea.

On May 9, 2007, the trial court sentenced Peña on one count of second degree identity theft, indicating that it would "follow the [State's] recommendation . . . for 22 months and credit for any time served, [and] also impose *the additional conditions there*. I'll waive the fine, but require restitution be imposed and impose the other financial obligations." Report of Proceedings (RP) at 9 (emphasis added). In Peña's judgment and sentence, the trial court failed to check the box imposing community custody, but did check the box requiring Peña to undergo "anger management treatment and fully comply with all recommended treatment," and to "enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases" of anger management treatment. Clerk's Papers (CP) at 77.

On November 28, 2007, the DOC contacted the trial court, asking it to amend Peña's judgment and sentence to "provid[e] an order for 9-18 months of community custody." CP at 87. DOC explained that, under former RCW 9.94A.715, Peña's conviction was eligible for 9 to 18 months of community custody. In response, on December 20, 2007, the trial court wrote the parties a letter acknowledging receipt of DOC's letter and indicating that, while Peña's statement of defendant on plea of guilty advised him of the community custody range, the judgment and sentence failed to impose such a condition. The trial court subsequently notified both parties that Peña needed to be brought back to court for resentencing.

At the April 2, 2008 resentencing, the State argued that Peña had notice that the community custody condition applied to his crime because it was clearly laid out in his statement

on plea of guilty and that at the original sentencing, the trial court indicated that it intended to follow the State's recommendation on length of sentence and the additional conditions, which logically included community custody. As a result, the State argued that the trial court's failure to impose community custody conditions on Peña was, in effect, a clerical error that needed to be corrected in order to accurately reflect the trial court's ruling. In response, Peña argued that if the trial court had wanted to impose community custody conditions on him, it would have done so at the time it sentenced him. As a result, Peña contended that the trial court consciously chose not to impose community custody, effectively imposing an exceptional sentence downward, without the supporting findings of fact and conclusions of law.

After hearing the arguments of the parties, the trial court determined that at the time of the plea negotiations and the entry of the plea of guilty, Peña was aware that he was subject to community custody. The trial court admitted that it did not recall precisely what it was thinking at the time it imposed Peña's sentence, but that "it certainly is the requirement of a [trial court] to follow the mandatory laws that are in effect and when the mandatory law is to impose community custody, that would have been the [trial] Court's intent." RP at 22. Ultimately, the trial court determined that its failure to impose community custody conditions at the time of Peña's sentencing was an "oversight of the Court [because] it was the intent of the [trial] Court to follow the mandatory law, and this being a prison sentence [it chose to] correct the judgment and sentence to impose the community custody." RP at 22-23. The trial court subsequently entered the following findings of fact and conclusions of law:

Findings of fact:

1. On May 9, 2007 [Peña] plead[ed] guilty to Identity Theft in the Second degree;
2. That [Peña] was informed at the time of entry of his plea of the

requirement of Community Custody;
3. That [former] RCW 9.94A.715 requires a term of Community Custody for Identity Theft in the Second degree for a person sentenced to a prison term;
4. That the Court on May 9, 2007 stated the State's recommendation was accepted and followed it in imposing sentence in this case;
5. That the Court in pronouncing the sentence on May 9, 2007 intended to follow the statutes requiring imposition of Community Custody; and
6. That the failure to impose the Community Custody in this case was a clerical error.

Conclusions of law

1. The court has jurisdiction over the matter
2. The court is required to order community custody pursuant to [former] RCW 9.94A.715
3. Section 4.6, page 7 shall be corrected to state that [Peña] is to be on Community custody for 9-18 months or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer
4. The Clerk shall transmit a copy of this order to the Department of Corrections.

CP at 93-94.

Following the trial court's resentencing, Pena timely appealed.

ANALYSIS

Community Custody

Peña argues that the trial court erred when it amended his judgment and sentence to reflect 9 to 18 months community custody because the trial court's decision not to impose community custody was intentional, and resulted in an exceptional sentence downward, without the required findings of fact and conclusions of law. Specifically, Peña contends that because the State failed to appeal this exceptional sentence, the State's attempt to modify his sentence was untimely. We disagree.

Courts have a duty and power to correct an erroneous sentence upon its discovery.[1] *In re Pers. Restraint of Call*, 144 Wn.2d 315, 334, 28 P.3d 709 (2001); *see also* RCW 10.73.090 (one-year time bar does not apply to judgment and sentence that is invalid in itself); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002); *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955) ("When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered") (emphasis omitted), *cert. denied*, 350 U.S. 1002 (1956), *overruled in part by State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973). In the past, we have required resentencing to correct invalid sentences. *See*, *e.g.*, *Brooks v. Rhay*, 92 Wn.2d 876, 602 P.2d 356 (1979); *State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973); *Dill v. Cranor*, 39 Wn.2d 444, 235 P.2d 1006 (1951). In fact, sentencing provisions outside the authority of the trial court are "illegal" or "invalid." *Pringle*, 83 Wn.2d at 193-94; *State v. Luke*, 42 Wn.2d 260, 262, 254 P.2d 718, *cert. denied*, 345 U.S. 1000 (1953).

When the trial court imposes a sentence that does not conform to the statutory mandate requiring imposition of a period of community placement, remand for amendment of the judgment and sentence is the proper remedy. *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). When a court sentences a person to the custody of DOC for a crime against persons, it is required to sentence the offender to community custody. Former RCW 9.94A.715(1). In 2006, the legislature amended RCW 9.94A.411(2) to include second degree identity theft as a crime

[1] Courts also have the power to correct clerical mistakes under CrR 7.8(a), which states in relevant part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

against persons. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 185-86, 163 P.3d 782 (2007); *accord* Laws of 2006, ch. 271, § 1.

Here, the trial court lacked the authority to sentence Peña following his guilty plea to second degree identity theft without also imposing the statutorily required community custody. Peña suggests that the trial court's decision not to impose community custody was a conscious decision to impose an exceptional sentence downward, without the required factual findings. But there is nothing in the record to support this argument. Instead, the trial court indicated that it intended to follow the State's recommendation and the applicable conditions and made no mention of any mitigating factors that would justify a departure from the standard range, including the statutory requirement of community custody. Thus, when the trial court amended Peña's judgment and sentence to reflect the required community custody, it was merely exercising its duty to correct an invalid sentence upon its discovery.

Anger Management Conditions

Peña next contends that the trial court erred when it imposed community custody conditions that were not authorized by law. Specifically, Peña argues that the trial court exceeded its statutory authority when it required Peña to undergo evaluation and treatment for anger management and required that he cooperate fully in that treatment. Specifically, Peña argues that there was nothing inherent in the charge, guilty plea colloquy, or either of the sentencing hearings to indicate that anger management treatment was "reasonably related" to Peña's offense. The State concedes that this provision was in error because there is no evidence in the record that anger management is "reasonably related" to Peña's crime. We accept the State's concession and strike this condition. *See State v. Zimmer*, 146 Wn. App. 405, 415-17, 190 P.3d 121 (2008),

review denied, 165 Wn.2d 1035 (2009).

The legislature must authorize a proper community custody condition because it is the legislature's sole province to fix legal punishments. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Former RCW 9.94A.715(2)(a) authorizes a sentencing court to "order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." In addition, when a trial court, imposes community custody for specified crimes, including second degree identity theft, it may order an offender to "participate in crime-related treatment or counseling services." RCW 9.94A.700(5)(c). As noted already, the State concedes that nothing in the evidence here shows that anger management issues contributed to Peña's offense. Accordingly, we accept the State's concession and strike that condition.

We affirm the trial court's modification of Peña's judgment and sentence to include community custody, but accept the State's concession and vacate the trial court's imposition of anger management treatment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, P.J.

HUNT, J.